A

Bar Malaysia v Peguam Negara Malaysia & Anor

B HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO WA-25–386–12 OF 2023
AMARJEET SINGH J
20 AUGUST 2024

C *Constitutional Law — Courts — Reference as special case of constitutional questions to Federal Court — Whether requirements of constitutional question made out — Whether High Court ought to hear question or transmit question to Federal Court for determination*

D

Constitutional Law — Attorney General — Powers of Attorney General — Discontinuation of criminal charges — Attorney General sought for discharge not amounting to aquittal ('DNAA') as opposed to a discharge amounting to an acquittal ('DAA') — Whether trial judge could question powers of Attorney E *General to discontinue criminal charges — Whether decision by Attorney General to apply for DNAA for an indefinite period of time amounted to violation of accused person's fundamental rights*

The second respondent ('accused') was charged with a total of 47 charges F comprising criminal breach of trust, corruption, and money laundering. The trial commenced and had consumed a total of 77 days. Subsequently, the Attorney General, through the deputy public prosecutor ('DPP') conducting the prosecution, informed the trial judge that the Attorney General had decided to discontinue the prosecution on all charges under art 145(3) of the G Federal Constitution ('the FC') and pursuant to s 254(1) of the CPC sought a discharge not amounting to aquittal ('DNAA') (as opposed to a discharge amounting to an acquittal ('DAA'). The accused, on the other hand, pressed for a DAA. The trial judge stated that while he could not question the decision of the Attorney General to discontinue the charges under art 145(3) of the FC, H the Attorney General had given cogent reasons for a DNAA and refused the order of DAA sought by the accused. The accused, being dissatisfied, filed an appeal to the Court of Appeal. The applicant went on to file encl 1 to challenge the AG's exercise of discretion to discontinue the criminal proceedings against the accused under art 145(3) of the FC. The applicant also filed encl 15, under I art 128(2) of the FC read together with s 84 of the Courts of Judicature Act 1964 ('the CJA') to refer, as a special case, three constitutional questions to the Federal Court for determination, namely; (a) whether the test in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209 ('Sundra Rajoo') that a challenge to the AG's decision to prosecute under

art 145(3) of the FC required the applicant to adduce 'compelling and prima facie proof' of its case at leave stage, applied to a challenge to the AG's decision to seek a DNAA under s 254 of the CPC ('question 1'); (b) whether in an application for judicial review of the AG's decision to apply for a DNAA pursuant to s 254 of the CPC, in light of art 145(3) of the FC, an applicant who was not the accused person bore the burden of producing 'compelling and prima facie proof' at leave stage when the factors and circumstances justifying the decision were known exclusively to the AG ('question 2'); and (c) whether a decision by the AG to apply for a DNAA of an accused person for an indefinite and/or undefined period of time under s 254 of the CPC amounted to a violation of the accused person's fundamental rights under art 5(1) read with art 8(1) of the FC.

Held, dismissing the encls 1 and 5:

(1) The High Court itself should determine constitutional questions at first instance unless the matter falls within the original jurisdiction of the Federal Court. The court, based on the provision of s 84 of the CJA, was required to carry out a two-stage exercise before a special case could be transmitted to the Federal Court. The first stage was whether the requirements of the constitutional question envisaged by the section had been made out. The second stage was whether the High Court, in the exercise of its discretion, ought to hear the question or transmit the question to the Federal Court for determination (see paras 16 & 19).

(2) The three requirements of constitutional question were: (a) the question to be referred must arise in any proceedings in any High Court; (b) the question related to the effect of any provision of the Constitution; and (c) the High Court judge should settle any questions of fact as may be necessary to assist the Federal Court in deciding the question, and to the speedy and economical final determination of the proceedings (*Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133). The basic requirements needed for a referral to be made under s 84 of the CJA were not met, namely, the requirement (b) above, ie that the question related to the effect of any provision of the Federal Constitution. For this reason, no constitutional question within the meaning of s 84 arose for a special case to be formulated. The application was therefore devoid of merit (see paras 20–21).

(3) Question 1 had been decided in *Sundra Rajoo*. Also, the DNAA sought under s 254 of the CPC was a separate matter from making a decision to discontinue proceedings under art 145(3). Further, the decision to direct a DNAA or a DAA was the decision of the judge hearing the criminal cases and not the court. Question 2 had also been decided in *Sundra Rajoo*. As for question 3, a question that had been decided by the judge hearing the criminal cases and not the court to direct a DNAA or DAA.

To raise it here was an abuse of the process of the court. Question 3 also did not relate to the effect of arts 5(1) and 8(1) of the Federal Constitution. The question was simply whether the direction of DNAA for an indefinite and/or undefined period of time was in violation of the said articles. In this regard, the accused had appealed to the Court of Appeal but was content to withdraw the appeal. Question 3, if at all, was for the Court of Appeal and not before this court. Enclosure 15 was dismissed (see paras 23–26 & 28–29).

(4) The pleaded case for leave in challenging the application for DNAA was misconceived in law. The actual challenge was the discontinuance of the criminal proceedings under art145(3) of the FC and not the DNAA under s 254 of the CPC. Further, the decision of whether to grant a DNAA or DAA was that of the criminal division of the court hearing the two criminal charges. The trial judge had decided to grant a DNAA. That decision stood, unless set aside on appeal by the Court of Appeal. If the order had been set aside by the Court of Appeal, the only order the Court of Appeal could make was to direct a DAA on all the 47 charges. The court could not interfere with the decision made by the trial judge (see paras 41–42).

[Bahasa Malaysia summary

Responden kedua ('tertuduh') telah dituduh dengan 47 pertuduhan melibatkan pecah amanah jenayah, rasuah, dan pengubahan wang haram. Perbicaraan telah bermula dan mengambil masa sebanyak 77 hari. Selepas itu, Peguam Negara, melalui timbalan pendakwa raya ('TPR') yang mengendalikan pendakwaan, memaklumkan kepada hakim bicara bahawa Peguam Negara telah memutuskan untuk memberhentikan pendakwaan ke atas semua pertuduhan di bawah perkara 145(3) Perlembagaan Persekutuan ('PP') dan menurut s 254(1) Kanun Tatacara Jenayah memohon melepaskan tanpa membebaskan ('MTM') (berbanding pelepasan dan pembebasan penuh 'PPP'). Tertuduh pula mendesak supaya diberikan perintah PPP. Hakim bicara menyatakan bahawa walaupun beliau tidak boleh mempersoalkan keputusan Peguam Negara untuk memberhentikan pertuduhan di bawah perkara 145(3) PP, Peguam Negara telah memberikan alasan yang kukuh untuk DNAA dan menolak permohonan PPP oleh tertuduh. Tertuduh, yang tidak berpuas hati, telah memfailkan rayuan ke Mahkamah Rayuan. Pemohon seterusnya memfailkan lampiran 1 untuk mencabar penggunaan budi bicara Peguam Negara dalam memberhentikan prosiding jenayah terhadap tertuduh di bawah perkara 145(3) PP. Pemohon juga memfailkan lampiran 15, di bawah perkara 128(2) PP dibaca bersama s 84 Akta Mahkamah Kehakiman 1964 ('AMK'), untuk merujuk sebagai kes khas tiga persoalan perlembagaan kepada Mahkamah Persekutuan untuk diputuskan, iaitu: (a) sama ada ujian dalam kes *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209 ('Sundra Rajoo') bahawa satu cabaran terhadap keputusan Peguam

Negara untuk mendakwa di bawah perkara 145(3) PP memerlukan pemohon mengemukakan 'bukti kukuh dan prima facie' pada peringkat kebenaran, turut terpakai kepada cabaran terhadap keputusan Peguam Negara untuk memohon DNAA di bawah s 254 KTJ ('soalan 1'); (b) sama ada dalam satu permohonan semakan kehakiman terhadap keputusan Peguam Negara untuk memohon MTM menurut s 254 KTJ, berhubung perkara 145(3) PP, pemohon yang bukan tertuduh menanggung beban untuk mengemukakan 'bukti kukuh dan prima facie' di peringkat kebenaran apabila faktor dan keadaan yang membenarkan keputusan tersebut hanya diketahui secara eksklusif oleh Peguam Negara ('soalan 2'); dan (c) sama ada keputusan oleh Peguam Negara untuk memohon DNAA terhadap seorang tertuduh bagi suatu tempoh masa yang tidak tertentu dan/atau tidak ditakrif di bawah s 254 KTJ merupakan satu pelanggaran terhadap hak asasi tertuduh di bawah perkara 5(1) dibaca bersama perkara 8(1) PP.

Diputuskan, menolak lampiran 1 dan 5:

(1) Mahkamah Tinggi sendiri sepatutnya menentukan persoalan perlembagaan pada peringkat pertama melainkan perkara itu terletak di bawah bidang kuasa asal Mahkamah Persekutuan. Berdasarkan peruntukan s 84 AMK, mahkamah dikehendaki melaksanakan proses dua peringkat sebelum sesuatu kes khas boleh dirujuk ke Mahkamah Persekutuan. Peringkat pertama ialah sama ada syarat-syarat persoalan perlembagaan yang dimaksudkan oleh seksyen tersebut telah dipenuhi. Peringkat kedua pula ialah sama ada Mahkamah Tinggi, dalam melaksanakan budi bicaranya, wajar mendengar persoalan itu sendiri atau merujukkannya ke Mahkamah Persekutuan untuk diputuskan (lihat perenggan 16 & 19).

(2) Tiga syarat bagi sesuatu persoalan perlembagaan adalah seperti berikut: pertama, persoalan yang hendak dirujuk itu mesti timbul dalam mana-mana prosiding di Mahkamah Tinggi; kedua, persoalan tersebut berkaitan dengan kesan mana-mana peruntukan Perlembagaan; dan ketiga, hakim Mahkamah Tinggi hendaklah memutuskan apa-apa persoalan fakta yang perlu bagi membantu Mahkamah Persekutuan dalam memutuskan persoalan tersebut, serta bagi penyelesaian muktamad prosiding secara cepat dan menjimatkan kos (*Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133). Namun demikian, keperluan asas untuk sesuatu rujukan dibuat di bawah s 84 AMK tidak dipenuhi, khususnya syarat kedua di atas, iaitu persoalan tersebut mestilah berkaitan dengan kesan mana-mana peruntukan Perlembagaan Persekutuan. Oleh itu, tiada persoalan perlembagaan dalam erti kata s 84 timbul untuk dirumuskan sebagai kes khas. Justeru, permohonan ini adalah tidak bermerit (lihat perenggan 20–21).

(3) Soalan 1 telah pun diputuskan dalam kes *Sundra Rajoo*. Tambahan pula,

permohonan MTM di bawah s 254 Kanun Tatacara Jenayah adalah perkara yang berasingan daripada keputusan untuk memberhentikan prosiding di bawah perkara 145(3) PP. Selain itu, keputusan sama ada untuk memberikan MTM atau PPP adalah kuasa budi bicara hakim yang mendengar kes jenayah tersebut dan bukannya keputusan mahkamah secara keseluruhan. Soalan 2 juga telah diputuskan dalam *Sundra Rajoo*. Berhubung dengan soalan 3, ianya sebenarnya merujuk kepada keputusan hakim yang mendengar kes jenayah untuk mengarahkan MTM atau PPP, dan membangkitkannya di sini adalah merupakan satu penyalahgunaan proses mahkamah. Soalan 3 juga tidak berkaitan dengan kesan perkara 5(1) dan 8(1) PP. Persoalannya hanyalah sama ada arahan MTM bagi suatu tempoh masa yang tidak ditentukan melanggar peruntukan tersebut. Dalam hal ini, tertuduh sendiri telah mengemukakan rayuan ke Mahkamah Rayuan tetapi berpuas hati untuk menarik balik rayuan tersebut. Maka, jika ada pun, soalan 3 adalah sepatutnya diputuskan oleh Mahkamah Rayuan dan bukannya di hadapan mahkamah ini. Oleh itu, lampiran 15 telah ditolak (lihat perenggan 23–26 & 28–29).

(4) Kes yang diplidkan bagi mendapatkan kebenaran untuk mencabar permohonan MTM adalah salah tafsir dari segi undang-undang. Cabaran sebenar adalah terhadap pemberhentian prosiding jenayah di bawah perkara 145(3) PP, bukannya terhadap MTM di bawah s 254 Kanun Tatacara Jenayah. Selain itu, keputusan sama ada untuk memberikan MTM atau PPP adalah kuasa mahkamah jenayah yang mendengar 47 pertuduhan tersebut. Hakim perbicaraan telah memutuskan untuk memberikan MTM, dan keputusan itu kekal melainkan dibatalkan melalui rayuan di Mahkamah Rayuan. Jika perintah itu dibatalkan oleh Mahkamah Rayuan, satu-satunya perintah yang boleh dibuat oleh Mahkamah Rayuan adalah untuk mengarahkan DAA bagi semua 47 pertuduhan. Mahkamah tidak boleh campur tangan dengan keputusan yang telah dibuat oleh hakim perbicaraan (lihat perenggan 41–42).]

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223, CA (refd)

Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor [2021] MLJU 1432; [2021] 8 CLJ 511, FC (refd)

Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 4 MLJ 133; [2020] 3 CLJ 593, FC (refd)

K Abdul Rasheed v PP; Ah Chak Arnold v PP [1985] 1 MLJ 193 (refd)

Koh Teck Chai v PP [1968] 1 MLJ 166 (refd)

PP v Gan Boon Aun [2017] 3 MLJ 12, FC (refd)

PP v Z [1995] MLJU 474; [1995] 4 CLJ 383, HC (refd)

R v DPP ex parte Manning [2001] 1 QB 330, QBD (refd)
R v Secretary of State for the Home Department, ex parte Rukshanda Begum [1990] COD 107, CA (refd)
Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209; [2021] 6 CLJ 199, FC (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442; [1995] 3 CLJ 627, SC (refd)
Vigny Alfred Raj a/l Vicetor Amratha Raja v PP [2022] 5 MLJ 639; [2022] 8 CLJ 1, FC (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 84
Criminal Procedure Code ss 254, 254(1), (3), 254A
Federal Constitution arts 5(1), 8(1), 128(2), 145(3)
International Organizations (Privileges and Immunities) Act 1992

Ambiga Sreenevasan (with Steven Thiruneelakandan, Sivaneindiren a/l Selvanandam, Gregory Das, Abhilaash Subramaniam and Shasha Ravindran) (Abhilaash Subramaniam & Co) for the applicant.
Shamsul Bolhassan (with Ahmad Hanir Hambaly @ Arwi and Imtiyaz Wizni Aufa Othman) (Attorney General's Chamber) for the first respondent.
Hj Hisham Abdullah @ Teh Poh Teik (with Ahmad Zaidi bin Zainal, Guok Ngek Seong, Mohamed Shahrul Fazli bin Kamarul Zaman, Hamidi bin Datuk Mohd Noh, Mohd Shahril bin Md Isa, Aiman Abdul Rahman, Fatini Athirah Baharain, Nur Khairunnisa Sabirah Abdul Manan and Sharifah Annafiza Al-Shahab bt Syed Fadzil) (Shahrul Hamidi & Haziq) for the second respondent.

Amarjeet Singh J:

INTRODUCTION

[1] There were two applications before me. Both are filed by the applicant, the Malaysian Bar.

First application: encl 1

[2] Enclosure 1, in the main, sought leave to commence judicial review proceedings for the following orders:

(a) an order of certiorari to quash the decision of the Attorney General (first respondent) on 4 September 2023 to apply for a discharge not amounting to an acquittal ('DNAA') in Criminal Case No WA-45–7–02

of 2019 and Criminal Case No WA-45–8–02 of 2019 ('the said criminal cases') against Ahmad Zahid bin Hamidi (second respondent and hereinafter referred to as 'the accused');

(b) a declaration that the decision to apply for DNAA is null and void and/or made in excess of the jurisdiction and/or powers granted to the Attorney General under art 145(3) of the Federal Constitution ('art 145(3)') and s 254(1) of the Criminal Procedure Code ('the CPC');

(c) in the event the above orders are granted, an order of mandamus directing the Attorney General to recharge the accused for the same 47 offences and to reinstate the trial under s 254A of the CPC;

(d) an order of mandamus directing the Attorney General to furnish the applicant with all information, documentation, reasons, basis, and particulars relied upon in arriving at the decision, including but not limited to the letters of representation submitted by the accused;

(e) an order of mandamus directing the Attorney General to provide the applicant (as and when required) all information, documentation, reasons, basis, and particulars pertaining to the status of the ongoing and/or further investigations by the Attorney General including informing of any decision to recharge or discontinue investigations against the accused; and

(f) an order that the applicant be given and/or granted access to all matters and/or documents filed in respect of the said criminal cases including any court recordings, orders, and judgments.

[3] The court in which the prosecution of the said criminal cases was conducted and subsequently discontinued and wherein the order of DNAA was made is the Criminal Division of this court. The learned judge, who made the DNAA order was Justice Collin Sequerah.

Second application: encl 15

[4] Enclosure 15 was made under art 128(2) of the Federal Constitution read with s 84 of the Courts of Judicature Act 1964 ('the CJA'). This application was made before the application for leave in encl 1 was heard and in the application, the following questions (hereinafter referred to as 'the said questions') be stated as a special case and referred by this court to the Federal Court for determination:

Question 1:

Whether the test in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209; [2021] 6 CLJ 199 that a challenge to the Attorney General's decision to prosecute under art 145(3) of the Federal Constitution requires the applicant to adduce 'compelling and prima facie proof' of its case at

the leave stage, applies to a challenge to the Attorney General's decision to seek a DNAA under s 254 of the Criminal Procedure Code.

Question 2:

Whether in an application for judicial review of the Attorney General's decision to apply for a DNAA pursuant to s 254 of the CPC in light of art 145(3) of the Federal Constitution, an applicant who is not the accused person bears the burden of producing 'compelling and prima facie proof' at leave stage when the factors and circumstances justifying the decision are known exclusively to the Attorney General.

Question 3:

Whether a decision by the Attorney General to apply for a DNAA of an accused person for an indefinite and/or undefined period of time under s 254 of the CPC amounts to a violation of the accused person's fundamental rights under art 5(1) read with art 8(1) of the Federal Constitution.

[5] The Attorney General and on the court's invitation, the accused, as the putative respondent, were heard on encl 1. I did so, based on the principle in *R v Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] COD 107 which has been applied by our courts since the Supreme Court's decision in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 3 CLJ 627. Enclosure 15 was an inter partes application and the respondents were heard as of right. I heard both applications at the same time. On 27 June 2024, I dismissed both enclosures and informed the parties that in the event of an appeal, detailed grounds and all other matters argued would also be included. Costs were only awarded against the applicant in respect of encl 15. I did not make any order of costs in respect of encl 1.

[6] This judgment contains the reasons for my decisions in respect of both enclosures. For the purposes of this judgment when the words 'Attorney General' appears it is also when the context refers to the 'public prosecutor'.

FACTS LEADING TO THE APPLICATION FOR LEAVE

[7] The accused was charged with a total of 47 charges comprising criminal breach of trust, corruption, and money laundering in the said criminal cases. The trial commenced on 18 November 2019 and the prosecution closed its case after calling 99 witnesses spanning a total of 53 days.

[8] On 24 January 2022, Justice Collin Sequerah ruled that the prosecution had successfully established a prima facie case and ordered Ahmad Zahid Hamidi to enter his defence on all the charges. The defence opened its case and had called 15 witnesses. At that point in time, the trial had consumed a total of 77 days of trial.

[9] On 4 September 2023, the Attorney General through the deputy public prosecutor ('DPP') conducting the prosecution, informed the learned judge that the Attorney General had decided to discontinue the prosecution on all charges under art 145(3) and pursuant to s 254(1) of the CPC sought a DNAA (as opposed to a discharge amounting to an acquittal ('DAA'). The following is what the DPP informed Justice Collin Sequerah:

1. The defence called 15 witnesses including the accused himself. *The prosecution believes that the testimonies of these witnesses need to be examined by both the prosecution and the investigators.*
2. The accused submitted two representation letters to the Attorney General's Chambers (AGC) dated 8.12.2022 and 25.1.2023, respectively.
3. Following the letters, the Malaysian Anti-Corruption Commission (MACC) informed the AGC on 20.1.2023 that *it is crucial to conduct a further detailed, comprehensive, and in-depth investigation.*
4. The accused once again, on 28.2.2023, and 7.3.2023, sent four more representation letters to raise new issues and evidence, *which undoubtedly required MACC to investigate.*
5. The letters also addressed the issue of *the investigation into the accused before, during, and after being charged in court, which was alleged to have been rushed, careless, premature, and incomplete.*
6. This matter undoubtedly has the potential to tarnish the reputation and credibility of the Attorney General Chamber (AGC) as the prosecuting party and the MACC as the investigating body. *It may appear that these institutions have been manipulated or exploited by certain parties for their own agenda.*
7. To ensure that the accused's rights are not denied and to prevent any miscarriage of justice, the prosecution believes *that all charges against the accused should be temporarily halted at this time, but only with the effect of a DNAA until a more thorough and comprehensive investigation is completed.*
8. The prosecution believes that this Court should take note of the Cabinet's announcement to establish a Royal Commission of Inquiry (RCI) *to investigate the former Attorney-General Tan Sri Tommy Thomas's memoir and the revelations he made regarding charges made against certain individuals.*
9. *The accused raised a serious issue in his representation letters such as claiming that he is a victim of selective prosecution by the previous government. The AGC believes that it is crucial for the prosecution and the MACC to thoroughly examine and investigate this claim.*
10. This is in line with the RCI's objectives, which, among other things, aim to investigate allegations related to professional misconduct by the highest officeholders in the country.
11. An internal memo purportedly issued by the AGC regarding the ongoing case has circulated on social media. The AGC is taking steps to verify the

content of this internal memo and believes it is important as it directly addresses the issues raised by the accused in his letters. (Emphasis added.)

[10] The accused, on the other hand, pressed for a DAA. Justice Collin Sequerah after hearing the parties delivered the following ex tempore grounds of the decision granting a DNAA based on the following reasons:

This is the decision of the court. *The prosecution through the AG, public prosecutor has exercised its power under art 145(3) of the Federal Constitution and* s 254 of the Criminal Procedure Code *to withdraw 47 charges against the accused person.*

The prosecution has however asked for an order, discharge not amounting to an acquittal, DNAA. They have advanced several reasons for this which include but are not limited to the need to further investigate on the charges proffered and that a RCI would be instituted in respect of the contents of the former AG's book. The defence, however, has objected to a request of DNAA and instead have asked the court to make an order of discharge amounting to an acquittal of DAA. The principle reason given is that the prosecution has not given a timeline for the completion of the investigation and for the setting up and conclusion of the RCI's findings.

It is clear from the reasons given by the prosecution that investigations are still ongoing as a result of representations made by the defence. However, it must be borne in mind that it was intimated to the court on a previous occasion when an adjournment was sought for by the defence that these representation took up several pages, I think it ran into hundreds of pages if memory serves me correctly. It is, therefore justified that the prosecution needed more time to examine these representations, which also involve taking statements from various individuals.

Numerous other reasons were also given. The reasons given by the learned DPP including that of the setting up of the RCI, although they do not have a timeline does not in any manner suggest that as far as the charges involved in this case, that is the end of the matter. *The prosecution has in my considered view has given cogent reasons why they seek for DNAA in this case.*

The authority cited by learned defence counsel can be distinguished. In *Public Prosecutor v Rozini bin Osman,* the prosecution did not state the clarify of why the accused respondent ought to be granted a DNAA unlike the present case. The complainant in that case has also withdrawn the police report before the charges were filed in the court. On the date appointed for trial, the appellant requested an adjournment because the investigating office was unable to locate the witness. When the complainant was called as a witness, she said that she did not intend to proceed with the case any longer.

In the case of *Koo Teck Chai v Public Prosecutor,* the prosecution could not trace the witness and the subpoena had not been served. In any event, both these cases and the case of *Public Prosecutor v MatZain* cited by the learned defence counsel, being High Court cases, does not bind this court. As far as the Federal Court case of *Vigny Alferd Raj v Public Prosecutor* is concerned, in that case no evidence has been led as yet. This is in struck contrast to the present case.

> And I place this on record, the trial of this case commenced on 18 November 2019. To date some 77 days of trial has elapsed. A total of 99 witnesses have been called by the prosecution.
>
> Defence was called and it is at the stage where the 15 defence witness is now giving evidence. In the premises and for reasons given this court makes an order for DNAA.
>
> Before I adjourn, *I wish to place on record that although the powers of the AG under art 145(3) of the Federal Constitution and s 254 of the CPC to institute and withdraw charges at any time before judgment is passed, is unquestioned.* Should the prosecution decide in the near future that they will not proceed with any further with the charges, then much precious judicial time would have been wasted and a great amount of taxpayers' money would also have been wasted. With that, this court stands adjourned. (Emphasis added.)

[11] The above reasons for decision clearly show that Justice Collin Sequerah stated that while he could not question the decision of the Attorney General to discontinue the charges under art 145(3) the Attorney General had given cogent reasons for a DNAA and refused the order of DAA sought by the accused.

[12] The accused, dissatisfied with the decision made by Justice Collin Sequerah filed an appeal to the Court of Appeal. The appeal has since been withdrawn by the accused. The effect is that the orders of DNAA in respect of the 47 charges remain.

[13] On 2 December 2023, the applicant filed encl 1 to challenge the Attorney General's exercise of discretion to discontinue the criminal proceedings against the accused under art 145(3) of the Federal Constitution and consequential relief. On 11 January 2024, at the hearing of the encl 1, counsel informed that the applicant will be filing an application under s 84 of the CJA for this court to refer as a special case constitutional questions to the Federal Court for determination. I adjourned the application for leave as requested by counsel. On 24 January 2024, the applicant filed encl 15. I now give my reasons separately for each enclosure beginning with encl 15.

DECISION: ENCL 15

[14] The Attorney General and the accused opposed the application. Their contentions can be summarised as follows: (a) encl 15 is an abuse of the process of the court as leave to commence judicial review had not even been granted and as such there are no 'proceedings' in existence within the meaning of s 84 of the CJA to fulfill the requirement of the said section; (b) the proposed questions are academic; and (c) without prejudice to the above grounds, constitutional questions, even if fulfilling the requirements of s 84 of the CJA

ought to be determined at first instance by this court including the question on the effect of a provision of the Federal Constitution.

[15] The applicant, on the other hand, submitted that the requirements for a reference to the Federal Court under s 84 of the CJA have been fulfilled and this court ought to by a special case transmit the questions to the Federal Court. It was submitted that a constitutional question as to the effect of a provision of the Federal Constitution can only be decided by the Federal Court. The applicant relied on the Federal Court's statement in *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 where the following was said:

> [30] Based on the clear provision of art 128(2) of the Federal Constitution, we are of the view *only the Federal Court has the jurisdiction to determine a question as to the effect of any provision of the Constitution for which the record of proceedings has been transmitted to the High court by a subordinate court.* (Emphasis added.)

Whether the Federal Court is an exclusive forum

[16] The submission, based on *Gan Boon Aun,* is that the Federal Court is the exclusive forum for the determination of constitutional questions 'as to the effect of any provision of the Constitution'. I am unable to agree. Later Federal Court cases, have held that the High Court itself should determine constitutional questions at first instance unless the matter falls within the original jurisdiction of the Federal Court. The reference to the Federal Court ought to be sparingly and carefully exercised. Needless to say, that questions on the effect of a provision of the Federal Constitution are not within the original jurisdiction of the Federal Court. In *Datuk Seri Anwar Ibrahim v Kerajaan Malaysia & Anor* [2021] MLJU 1432; [2021] 8 CLJ 511 Zaleha Yusof FCJ said as follows:

> [13] Section 84 of the CJA is special reference jurisdiction which should be exercised carefully and sparingly. *Ordinarily and generally, the High Court itself should determine constitutional questions at first instance unless the matter falls within the original jurisdiction of the Federal Court.* This is implicit from the use of the term 'special case' both under Art 128 of the Federal Constitution and s 84 of the CJA. Nallini Pathmanathan FCJ in DSA11 (*Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133; [2020] 3 CLJ 593) had deliberated extensively on this aspect and we agree with the views expressed therein. (Emphasis added.)

[17] The case mentioned in the above passage in which Nallini Pathmanathan FCJ delivered judgment was *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133; [2020] 3 CLJ 593. There, at para [32], Her Ladyship, amongst others, said: (a) that s 84 does not fundamentally change the nature of the Federal Court into a constitutional court; (b) the Federal Court is not a *carte blanche* for all constitutional

questions to be referred to and determined by the court in every case; (c) the High Court should normally determine constitutional questions themselves at first instance.

[18] The key provision is s 84 of the CJA which contains the requirements to be fulfilled before a reference can be made to the Federal Court. The section provides as follows:

> (1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.
>
> (2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.
>
> (3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.
>
> (4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.

The requirements of s 84 of the CJA

[19] This court, based on the provisions is required to carry out a two-stage exercise before a special case can be transmitted to the Federal Court. The first stage is whether the requirements of the constitutional question envisaged by the section have been made out. The second stage is whether the High Court in the exercise of its discretion ought to hear the question or transmit the question to the Federal Court for determination.

Requirements of a constitutional question

[20] The requirements of the constitutional question are stated in the judgment of Nallini Pathmanathan FCJ in *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133; [2020] 3 CLJ 593. There are three requirements:

(a) the question to be referred must arise in any proceedings in any High Court;

(b) the question relates to the effect of any provision of the constitution; and

(c) the High Court judge should settle any questions of fact as may be necessary to assist the Federal Court in deciding the question, and to the speedy and economical final determination of the proceedings.

[21] I have considered the questions carefully and am satisfied that the basic requirements needed for a referral to be made under s 84 of the CJA are not met, namely, the requirement (b) above ie that the question relates to the effect of any provision of the Federal Constitution. For this reason, no constitutional question within the meaning of s 84 arose for a special case to be formulated. The application was therefore devoid of merit.

Question 1

[22] To recap, question 1 was framed as follows: whether the test in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209; [2021] 6 CLJ 199 that a challenge to the Attorney General's decision to prosecute under art 145(3) of the Federal Constitution requires the applicant to adduce 'compelling and prima facie proof' of its case at the leave stage, applies to a challenge to the Attorney General's decision to seek a DNAA under s 254 of the Criminal Procedure Code.

[23] This question has been decided in *Sundra Rajoo,* in particular in para [113] of the judgment which read as follows:

> In all challenges against the decisions of the AG/PP exercising his powers under art 145(3) of the FC, the position is that his decisions are cloaked with the presumption of legality. The onerous burden lies on the challenging party to overcome the strong presumption of legality with compelling prima facie evidence of grounds to review the AG/PP's decision within the recognised reasons for judicial review.

[24] Secondly, the DNAA sought under s 254 of the CPC is a separate matter from making a decision to discontinue proceedings under art 145(3). Thirdly, the decision to direct a DNAA or a DAA is the decision of the learned judge hearing the criminal cases and not this court.

Question 2

[25] Question 2 was framed as follows: whether in an application for judicial review of the Attorney General's decision to apply for a DNAA pursuant to s 254 of the CPC in light of art 145(3) of the Federal Constitution, an applicant who is not the accused person bears the burden of producing 'compelling and prima facie proof' at leave stage when the factors and

circumstances justifying the decision are known exclusively to the Attorney General.

[26] This question has also been decided in *Sundra Rajoo* in para [113] of the judgment (see para [23] above). Where the Federal Court said that the challenging party has to overcome the strong presumption of legality with compelling prima facie evidence of grounds to review the Attorney General's decision.

Question 3

[27] Question 3 provides as follows: whether a decision by the Attorney General to apply for a DNAA of an accused person for an indefinite and/or undefined period of time under s 254 of the CPC amounts to a violation of the accused person's fundamental rights under art 5(1) read with art 8(1) of the Federal Constitution.

[28] Firstly, this is a question that had been decided by the learned judge hearing the criminal cases and not this court to direct a DNAA or DAA. To raise it here is an abuse of the process of the court. Secondly, the question also does not relate to the effect of arts 5(1) and 8(1) of the Federal Constitution. The question is simply whether the direction of DNAA for an indefinite and/or undefined period of time is in violation of the said articles. In this regard, the accused had appealed to the Court of Appeal but was contented to withdraw the appeal. Thirdly, the question, if at all was for the Court of Appeal and not before this court.

My decision on encl 15

[29] Enclosure 15 is dismissed for the above reasons.

DECISION: ENCL 1

[30] The starting point is to reproduce art 145(3) and s 254 of the CPC which are the key provisions in this application. Article 145(3) read as follows:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court, or a court martial, while section 254 which provides as follows:
>
> (1) At any stage of any trial, before the delivery of judgment, the Public Prosecutor *may, if he thinks fit, inform the Court that he will not further prosecute* the accused upon the charge *and thereupon all proceedings on the charge against the accused shall be stayed* and *the accused shall be discharged of and from the same.*

(2) At any stage of any trial before a Sessions Court or a Magistrates Court before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the Court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on the charge against the accused may be stayed by leave of the Court and, if so stayed, the accused shall be discharged of and from the same.

(3) *Such discharge shall not amount to an acquittal unless the Court so directs.*

The applicant's submissions

[31] To recap, the applicant sought leave of this court for an order of *certiorari* to quash the decision of the Attorney General to apply for a DNAA in the two criminal cases commenced against the accused and a declaration that the decision to apply for DNAA is null and void and/or made in excess of the jurisdiction and/or powers granted to the Attorney General under art 145(3) and s 254(1) of the CPC. It is to be observed that the application for leave was not to quash the decision of the Attorney General to discontinue the prosecution of the criminal cases.

[32] The applicant submitted that (encl 24 para 57) the applicant has satisfied the test of disclosing an arguable case that the Attorney General's decision to apply for a DNAA was infected with illegality and/or irrationality ie unreasonableness in the *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 sense. The test is that established in the case of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478.

[33] In this regard, the applicant relied on the statements in respect of s 254(3) of the CPC appearing in the following cases. The first is the proposition by Ong Hock Sim J in *Koh Teck Chai v Public Prosecutor* [1968] 1 MLJ 166 where it was said:

> The power enabling the discharge of an accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only *where the court is satisfied for good cause shown that the public interest insistently demands that it be used*. (Emphasis added.)

Second, is the acknowledgement of Lai Kew Chai J in *K Abdul Rasheed v Public Prosecutor; Ah Chak Arnold v Public Prosecutor* [1985] 1 MLJ 193 of the existence of persuasive authorities, which gave a contrary interpretation to His Lordship's interpretation in the following words:

> On the other hand, there is ample persuasive authority for the proposition that unless *some good ground is shown it would not be right to leave an individual saddled with a charge in which proceedings are stayed for an indeterminate period*. (Emphasis added.)

A And lastly, the proposition in *Public Prosecutor v Z* [1995] MLJU 474; [1995] 4 CLJ 383 where Mohd Hishamuddin J said:

> *Normally, the discharge should amount to an acquittal, unless good cause is shown otherwise.*

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[34] The applicant contended, based on the above cases, that there is a high threshold for the Attorney General to apply for a DNAA of an accused person after discontinuing the criminal proceedings. This is the wrong test as will be shown below. There is no high threshold for the Attorney General to apply for
C a DNAA under s 254 of the CPC. The whole premise of the applicant had begun on the wrong footing as discussed below.

The interpretation of s 254(3)

D **[35]** The binding interpretation on s 254(3) of the CPC at the time the applicant filed its application for leave is the majority's (Zabariah Mohd Yusuf FCJ with Mohd Zawawi Salleh FCJ concurring) interpretation by the Federal Court in *Vigny Alfred Raj a/l Vicetor Amratha Raja v Public Prosecutor* [2022] 5 MLJ 639; [2022] 8 CLJ 1. The interpretation is in the following paragraphs:

E [91] It is my view that, a *plain and literal reading of s 254(3) of the CPC means that any discharge granted by the court under* s 254 *is a discharge not amounting to an acquittal. But for a discharge amounting to an acquittal, it must be specifically directed by the court.* The opening wordings of the section are clear and unambiguous, hence the court must give effect to its plain and literal meaning. ...

F [92] I have read and examined the authorities and cases referred to, in the judgment and found that, they never ruled on the interpretation to be accorded to s 254(3) of the CPC to the effect that 'the court has to specifically direct that the discharge does not amount to an acquittal. Otherwise, the default position is that the discharge amounts to an acquittal'. *In my view, what those cases held were that, the court is vested*
G *with the discretionary power to direct an acquittal of an accused person pursuant to s 254(3) of the CPC and that such discretion is to be exercise judiciously.* In other words, s 254(3) of the CPC does not fetter the discretion of the court in directing that the discharge to amount to an acquittal, if circumstances warrant it. The following cases support this proposition: ...

H [93] The case of *Goh Cheng Chuan v Public Prosecutor (a Singapore case)* and *Public Prosecutor v Ambika Shanmugam* are two cases which dealt specifically with the phrase 'unless the court so directs' which appears in s 254(3) of the CPC which is in *pari materia* with s 184(2) of the Singapore Criminal Procedure Code. *Public Prosecutor v Ambika* relied on *Goh Cheng Chuan v Public Prosecutor,* which agreed with the decision of Lai Kew Chai J in *K Abdul Rasheed v Public Prosecutor; Ah Chak*
I *Arnold v Public Prosecutor* [1985] 1 MLJ 193, at p 195 which states:

> Sub-s 184(2) begins with the proposition of law that such discharge shall not amount to an acquittal, followed by the crucial words 'unless the court so directs ...' ... These crucial words plainly confer on the court the discretionary power to direct an acquittal and the power arises the moment the prosecution informs the

court that it is not going on with the prosecution of the defendant upon the charge, whether or not the prosecution has decided forever to withdraw the charge.

If an accused applies for a discharge amounting to an acquittal, a court must bear in mind that the Legislature has in the opening words of sub-s 184(2) set down the principle that the discharge 'shall not' amount to an acquittal. There must be circumstances in the proceedings so far on record or the accused must show sufficient reasons to displace the principle that the discharge shall not amount to an acquittal. In exercising its power under sub-s 184(2) of the Code, a court must bear in mind and give due regard to the right of the prosecution to proceed at a later stage; (Emphasis added.)

[36] Thus, once the Attorney General informs the court that he is discontinuing the prosecution, before judgment is delivered, which would naturally include the stage after defence is called, an order directing a DNAA would automatically be made by the court unless the court orders a DAA based on the facts and circumstances. On this interpretation of the Federal Court the Attorney General need not even ask for a DNAA as it is implicit in the subsection but the court can direct a DAA if the facts and circumstances warrant it. To grant a DAA the court must act judiciously.

[37] Justice Collin Sequerah was asked to grant a DAA by the accused but from His Lordship's extempore decision refused the order of DAA and granted a DNAA based on the reasons given by the Attorney General.

My decision on the application for leave as framed

[38] The interpretation that the applicant relied on was the minority interpretation given by Mary Lim FCJ in *Vigny Alfred Raj* which said that it is for the prosecution to apply for the direction of DNAA and the court when faced with such application must ascertain from the prosecution whether the prosecution intends to proceed against the accused at a later stage, and the reasons for not proceeding presently. Therefore, according to the minority, it must only be in exceptional circumstances and for sound cogent reasons that the court is to exercise its discretion under s 254(3) of the CPC and direct a DNAA.

[39] However, I am found by the majority in *Vigny Alfred Raj*'s decision on the interpretation of s 254(3) of the CPC. The application for leave is therefore misconceived for shifting the burden on the Attorney General in the situation where the Attorney General informs the court of his decision to discontinue proceedings, in such a situation, the direction of DNAA is automatic unless the court after hearing parties orders a DAA based on the facts and circumstances before it.

[40] The decision of the court under s 254(3) of the CPC does not amount to an interference of or impingement of the Attorney General's decision to discontinue the prosecution. This was the unanimous decision in *Vigny Alfred Raj* as reflected in the following paragraph:

> Where the Attorney-General as Public Prosecutor has made up his mind, the law has provided in s 254 the consequences or orders that the court may make in response to such a decision. I would immediately dispel all misconception that any order made by the court as a consequence to being informed by the learned DPP that the AG/PP has decided not to continue with the prosecution, does not in any way amount to an interference of or impingement on, the AG's powers under art 145 of the Federal Constitution. Such orders include an order discharging and acquitting an accused under s 254.

[41] Based on the above reasons, the pleaded case for leave in challenging the application for DNAA is misconceived in law. The actual challenge is the discontinuance of the criminal proceedings under art 145(3) and not the DNAA under s 254 of the CPC.

[42] Further, the decision of whether to grant a DNAA or DAA is that of the criminal division of this court hearing the two criminal charges. Justice Collin Sequerah has made a decision to grant a DNAA. That decision stands, unless set aside on appeal by the Court of Appeal. Interestingly, if the order had been set aside by the Court of Appeal, the only order the Court of Appeal could make is to direct a DAA on all the 47 charges. This court, cannot interfere with the decision made by Justice Collin Sequerah on the reasons proffered by the Attorney General before His Lordship.

Judicial review over decisions made under Art 145

[43] What I have said above is sufficient to dispose of this application for leave. Nevertheless, for the avoidance of any doubt, I also considered the submission of the applicant where the following was contended:

> Even if the higher threshold test pronounced by the Federal Court in *Sundra Rajoo* is applicable, the test is, in any event, still made out when the matters set out in paras 41 and 57 to 96 of the Malaysian Bar's First Submission (JR leave) are read together. This includes (in summary):
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> (i) The Second Respondent was charged at the end of 2018 when he no longer held public office;
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> (ii) 47 charges were brought against the Second Respondent including for criminal breach of trust, corruption, money laundering and bribery with respect to a charity;
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> (iii) Within less than a week of taking of office of Deputy Prime Minister, the Second Respondent submitted representations to the First Respondent;

(iv) After 53 days of trial and the calling of 99 witnesses, on the High Court Judge found that a prima facie case had been established by the Prosecution on all charges;

(v) Less than a year after the Second Respondent took office as Deputy Prime Minister, the First Respondent sought a DNAA in the proceedings on all 47 charges (despite the fact that a prima facie case was already established against the Second Respondent);

(vi) The purported reasons provided by the First Respondent in applying for the DNAA (see Tab B) are generic and not unique or specific to the Second Respondent. Particularly the reasons in, inter alia, paras 1–7, 10 and 11 could apply to the prosecution of any individual;

(vii) The First Respondent in applying for a discharge after a prima facie case had been established and without specific and cogent reasons, is in and of itself compelling and prima facie proof that the grounds for judicial review may be made out. This is especially so when following the establishment of a prima facie case by the Prosecution, a conviction will naturally follow unless a defence is raised to rebut the same; and

(viii) The decision of the Lord Chief Justice of England and Wales (Lord Bingham), Supreme Court of Judicature Queen's Bench Divisional Court in *R v DPP ex parte Manning* [2001] 1 QB 330 is relevant. Part of the decision in granting judicial review was that the prosecution was not brought despite the fact that a prima facie case could be established against the accused [at page 46-47, ABA (JR) 5]:

[44] Suffice to state, that prior to the decision in *Sundra Rajoo* the decision of the Attorney General made pursuant to art 145(3) was not amenable to judicial review. *Sundra Rajoo* was decided in 2021, and the Federal Court departed from the earlier position holding that the decision of the Attorney General made pursuant to art 145(3) is amenable to judicial review in appropriate, rare and exceptional cases, and cautioned that as a matter of policy, the decision remains subject to a higher threshold of scrutiny. Most importantly, the Federal Court set out the test at leave stage when a challenge is made against the decision of the Attorney General under art 145(3).

[45] It is apposite to reproduce the following relevant paragraphs of the Federal Court on the decision:

> [112] Article 145(3) of the FC *provides the AG/PP with a wide discretion to institute, conduct or discontinue any proceeding for a criminal offence.* This wide discretion means the AG/PP has sole and exclusive discretion in that only he/she can exercise such power. However, the AG/PP does not have absolute or unfettered discretion under art 145(3). ... *it is our judgment that in appropriate, rare and exceptional cases, such discretion is amenable to judicial review.*
>
> [113] In all challenges against the decisions of the AG/PP exercising his powers under art 145(3) of the FC, *the position is that his decisions are cloaked with the*

presumption of legality. The onerous burden lies on the challenging party to overcome the strong presumption of legality with compelling prima facie evidence of grounds to review the AG/PP's decision within the recognised reasons for judicial review.

[114] Based on the foregoing authorities, it can be surmised that *any challenge must therefore pass a two-step threshold which must be satisfied at the leave stage of any application for judicial review.*

[115] Firstly, *the burden of proof lies on the applicant.* The applicant will have to show that he has a legal basis to challenge the decision of the AG/PP. This refers to the traditional grounds of judicial review and other bases implicitly recognised by the earlier judgments on this subject, including but not limited to:

(a) illegality;

(b) procedural impropriety (eg, breach of the rules of natural justice);

(c) irrationality (considering irrelevant considerations or ignoring relevant and material considerations); and

(d) *mala fides.*

[116] Once the above legal grounds or any of them are clearly set out, *the applicant will then have to adduce compelling and prima facie proof that the decision or omission of the AG/PP falls within those grounds or any one of them. In other words, the courts are to presume, having regard to the doctrine of separation of powers, that all or any of the grounds were not made out unless the evidence singularly leads to the inevitable conclusion that they have been made.* It is only after that threshold is crossed that the AG/PP bears the burden to justify his actions or inactions to the court. *Ramalingam* at paras 27 to 28 is instructive:

> 27. That the burden of proof lies on the offender in this regard is a wholly trite proposition that is reflected in s 103(1) of the Evidence Act, which states that '[w]hoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist'. In constitutional challenges to the prosecutorial discretion based on an alleged breach of one or more of the fundamental liberties enshrined in the Constitution, it is only when enough evidence is adduced to show a prima facie breach that the evidential burden will be shifted to the Attorney-General to justify his prosecutorial decision.
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> 28. However, once the offender shows, on the evidence before the court, that there is a prima facie breach of a fundamental liberty (ie, that the Prosecution has a case to answer), the prosecution will indeed be required to justify its prosecutorial decision to the court. If it fails to do so, it will be found to be in breach of the fundamental liberty concerned. At that stage, the Prosecution will not be able to rely on its discretion under art 35(8) of the Constitution, without more, as a justification for its prosecutorial decision.

[117] Needless to say, the assessment of the law and the facts will depend on the unique circumstances of each and every case. We state again at the risk of repetition that the assessment in each and every case must be made having regard to the doctrine of separation of powers

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> [118] Further, in making that factual assessment, the court must also be satisfied that judicial review is the only method of redress available to the litigant. (Emphasis added.)

Application of the two-step test in Sundra Rajoo's case

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[46] The facts of *Sundra Rajoo* are as follows. Sundra Rajoo was the former director of Asian International Arbitration Centre ('AIAC') which was established under the auspices of the Asian-African Legal Consultative Organization ('AALCO'). He was charged in his capacity as director of AIAC with criminal breach of trust by the Attorney General. Sundra Rajoo claimed to have legal immunity status under the agreement between AALCO and Malaysia read with the International Organizations (Privileges and Immunities) Act 1992 (Act 485). The Attorney General had applied to the Secretary General of AALCO for an ad hoc waiver of immunity but the request was denied. Notwithstanding this, the Attorney General proceeded to charge Sundra Rajoo. To protect himself, Sundra Rajoo applied for judicial review seeking a declaration of his immunity status and an order of prohibition in respect of the criminal proceedings instituted against him. The Federal Court found that Sundra Rajoo had functional immunity (as opposed to absolute immunity) under Act 485 which included immunity from criminal proceedings.

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[47] In applying the law to the facts, the Federal Court said that, on the facts, Sundra Rajoo had correctly identified illegality as the ground for judicial review by adducing cogent documentary evidence, which *ex facie*, is to the effect that the Attorney General had acted in breach of art 145(3) by charging him. The following paragraphs show the fulfilment of the 'compelling and prima facie evidence' falling within the ground of illegality:

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> [122] The evidence on record led to no other conclusion but that the second respondent knew or ought to have known that the appellant was covered by the scope of his functional immunity. Despite this, the second respondent (Attorney General) had obviously made up his mind to charge the appellant (Sundra Rajoo). One clear and direct indication of this is the second respondent's issuance of his consent to prosecute the appellant to the third respondent in spite of the letter from the Secretary General of AALCO of even date indicating that the first and second respondents had already requested independently for an ad hoc waiver of immunity which requests were vigorously denied.
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> [123] On the factual matrix of this appeal, where the legal issue of immunity and jurisdiction can be determined *ex facie*, we were satisfied that this was a proper and appropriate case to be determined by judicial review and that the appellant could not avail himself of any other form of legal redress in any other court.
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> [124] Hence, we found that the appellant had satisfied the two-step test. He identified illegality, the correct ground for review, and adduced compelling prima facie evidence to sustain that allegation. The second respondent was unable to rebut

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those allegations and the presumption of legality over the second respondent's exercise of discretion under art 145(3) was successfully overcome. In those narrow circumstances, we allowed the appeal.

Application of the two-step test in the instant case

[48] A challenge against the Attorney General's discretion under art 145(3) to institute, conduct, and discontinue a prosecution must therefore pass the two-step threshold at the leave stage of the application for judicial review (see para [114] *Sundra Rajoo's* case). An important reminder is that the decision made by the Attorney General under art 145(3) is cloaked by the presumption of legality and therefore the burden lies on the applicant to rebut the presumption.

[49] The two-step test is as follows:

(a) the applicant must show a legal basis to challenge the decision of the Attorney General on the recognised grounds of judicial review eg *illegality, procedural impropriety, irrationality,* and *mala fides*; and

(b) once the ground for judicial review is set out, the applicant needs to show compelling and prima facie proof that the decision or omission of the Attorney General falls within the ground or any one of the grounds relied on. (Emphasis added.)

[50] In this regard, it was clearly propounded by the Federal Court, that the burden on the applicant is onerous, in that, the court are to presume, having regard to the doctrine of separation of powers, that all or any of the grounds were not made out unless the evidence adduced by the applicant singularly lead to the inevitable conclusion that they have been made out.

[51] I have considered each of the matters raised by the applicant and even if the applicant relies on the grounds of illegality and/or irrationality, I hold that the grounds are not made out as there is no evidence adduced by the applicant that singularly leads to the inevitable conclusion that either or both grounds have been made out on a prima facie basis. The applicant has therefore failed to meet the two-step test. The presumption of legality of the Attorney General's decision to discontinue the criminal proceedings has not been rebutted by compelling and prima facie proof. Thus, the application for leave would also have been dismissed if the above submission had been pleaded properly by the applicant.

MANDAMUS

[52] For completeness, the orders of mandamus sought do not meet the basic requirements. There is no duty on the Attorney General to prosecute or recharge any person in the exercise of his prosecutorial discretion where he has considered the material available to him in the investigation papers. There is also no duty to furnish the Malaysian Bar with any documents as sought in the alternative reliefs.

CONCLUSION

[53] For the avoidance of doubt, I made no decision on the locus standi of the applicant to file this application for leave challenging the decision of the Attorney General under art 145(3).

[54] For the above reasons, encls 1 and 15 were dismissed.

Enclosures 1 and 15 dismissed.

Reported by K Selvaraju